

ANIMAL WELFARE ACT

COURT DECISION

**HAROLD P. KAFKA v. SECRETARY OF AGRICULTURE.
No. 99-5313.
Filed May 25, 2001.**

(Cite as 259 F.3d 716 (3d Cir.)).

**Animal Welfare Act - Default - Jurisdiction of Judicial Officer - Prior violation -
Final decision - Untimely appeal.**

The United States Court of Appeals, Third Circuit, upheld the Judicial Officer's (JO) decision. The JO found that under the regulations at 7 C.F.R. § 1.145, the Administrative Law Judge's (ALJ) decision became final and effective after 35 days and the JO was without jurisdiction to review the ALJ's decision when the Respondent's appeal petition was not timely filed.

Respondent was *Pro se* and failed to file a timely response to the underlying Complaint whereupon, the ALJ entered a default decision against him. Respondent had a civil penalty from a prior Complaint which was suspended and which was re-instituted as a result of this case.

**United States Court of Appeals
Third Circuit**

Before: SCIRICA, RENDELL and FUENTES, CIRCUIT JUDGES

PER CURIAM

On July 7, 1998, the Administrator of the Animal and Plant Health Inspection Service (the "Administrator") filed a complaint alleging that Petitioner Harold Kafka exhibited animals without a license in violation of the Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (1999), and the regulations thereunder, 9 C.F.R. §§ 1.1-4.11 (1999). The complaint directed Petitioner to file a timely answer and stated that a failure to do so would be an admission of the allegations in the complaint.

In serving the complaint, the hearing clerk notified Petitioner by letter that he had twenty days from its receipt to answer and that a failure to do so would be an admission of the allegations and would waive his right to a hearing. The hearing clerk provided Petitioner a copy of the Rules of Practice governing the proceedings. These documents were served on Petitioner, as shown by a certified mail

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receipt, on September 18, 1998.¹ On October 14, 1998, the hearing clerk notified Petitioner that the Department did not receive a timely answer to the complaint. On October 21, 1998, the hearing clerk received a letter from Petitioner stating, "At this time I am responding to Complaint and am not guilty and I am sure I will hear from you soon."

The Administrator filed a Motion for Adoption of Proposed Decision and Order on October 29, 1998. The Administrator asserted that the hearing clerk served the complaint and the Rules of Practice on Petitioner and informed him that the failure to answer any allegation in the complaint would be an admission of that allegation and Petitioner failed to file a timely answer. Since Petitioner admitted the allegations by default, the Administrator moved for the adoption of an order assessing a civil penalty of \$5,000 for violation of the Animal Welfare Act. In addition, Respondent sought the assessment of a civil penalty of \$22,500 which was imposed upon Petitioner in a prior proceeding but was suspended upon the condition that Petitioner not violate the Animal Welfare Act for a period of twenty years. On November 2, 1998, the hearing clerk sent Petitioner by certified mail a copy of the motion and proposed decision and order and informed him that he had twenty days from their receipt to file objections. Petitioner received the documents on November 5 as shown by a certified mail receipt.

Having received no objections, on December 1, 1998, an Administrative Law Judge ("ALJ") ruled that Petitioner failed to timely answer the complaint and its allegations were deemed admitted. The ALJ thus found that Petitioner exhibited animals without a license in violation of the Animal Welfare Act and the regulations thereunder and assessed the civil penalties of \$5,000 and \$22,500. The order stated that it would be effective after becoming final thirty-five days after service, pursuant to the Rules of Practice. The hearing clerk sent Petitioner by certified mail a copy of the decision and order and notified him that he had thirty days from their service to appeal to a Judicial Officer. The hearing clerk also informed Petitioner that if he did not appeal, the ALJ's decision is binding and effective thirty-five days after its service and that no decision is final for purposes of judicial review except a final order issued by the Secretary of the

¹ This was the second time the hearing clerk served these documents. They were initially served by certified mail and returned marked "unclaimed." On August 4, 1998, they were served by regular mail pursuant to the Rules of Practice. On August 27, 1998, the hearing clerk notified Petitioner that the Department did not receive a timely answer to the complaint.

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Department of Agriculture or a Judicial Officer pursuant to an appeal. The documents were returned marked "unclaimed" and on January 14, 1999, a legal technician served them by regular mail pursuant to the Rules of Practice.

On February 2, 1999, the hearing clerk received a letter from Petitioner requesting an appeal and stating that while he had previously plead not guilty, he did not hear from the hearing clerk until he received the ALJ's decision. Petitioner requested information about how to file an appeal. On February 3, 1999, a hearing clerk sent Petitioner a letter enclosing a copy of his filing, and stating, that the Administrator had twenty days to respond. The Administrator filed a memorandum arguing that since Petitioner failed to timely answer the complaint, the ALJ's decision and order were properly entered. The Administrator described its filing as opposition to Petitioner's motion to set aside the default decision.

On March 1, 1999, a Judicial Officer ruled that Petitioner's February 2 letter did not conform to the requirements for an appeal petition and did not move to vacate the ALJ's decision. Rather, the letter was a request for information. The Judicial Officer granted the request and directed Petitioner to the applicable provision of the Rules of Practice. The Judicial Officer also advised Petitioner that a default decision becomes final thirty-five days after service and since the record indicates that he was served on January 14, 1999, the ALJ's decision became final on February 18. Citing, numerous agency decisions, the Judicial Officer stated that he has no jurisdiction to hear an appeal that is filed after a decision becomes final. He stated that he could only consider an appeal petition if Petitioner showed that the record does not accurately reflect when he was served with the ALJ's decision and that he filed an appeal petition within thirty-five days of the date on which he was served.

On March 5, 1999, Petitioner responded by letter stating that he believed he had twenty days from February 15 to appeal, that he has been trying to file an appeal and that he was denied his right to a hearing. Petitioner also submitted a document allegedly supporting that he did not violate the Animal Welfare Act. On the same date, the hearing clerk sent Petitioner a letter enclosing a copy of his filing and stating that the Administrator would have twenty days to respond. The Administrator again argued in response that since Petitioner failed to file a timely answer to the complaint, the ALJ's decision was proper and further argued that the appeal petition is untimely.

On April 5, 1999, the Judicial Officer ruled that Petitioner's appeal petition is untimely. In response to his contention that he had twenty days from February 15 to appeal, the Judicial Officer found that the

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correspondence sent to Petitioner at this time was the letter informing him that the Administrator had twenty days to respond to his February 2 letter. While Petitioner stated that he had been trying to file his appeal, the Judicial Officer found that despite any efforts that Petitioner may have made, he did not file an appeal petition until March 5. The Judicial Officer concluded again that since the ALJ's decision was served on January 14, 1999 and became final on February 18, he no longer has jurisdiction to consider the appeal. The Judicial Officer found this construction of the Rules of Practice consistent with the construction of Federal Rules of Appellate Procedure and further stated that the matter should not be considered by a reviewing court since under § 1.139 of the Rules of Practice, no decision is final for purposes of judicial review except a final decision of the Judicial Officer on appeal. The Judicial Officer ordered that the ALJ's decision is the final decision in this proceeding. Petitioner filed a timely petition for review.

This Court has jurisdiction to review a final order of the Secretary of Agriculture pursuant to 7 U.S.C. § 2149(c) and 28 U.S.C. § 2342. While the petition for review refers to the ALJ's decision that Petitioner violated the Animal Welfare Act, this Court has no jurisdiction to review that decision. The only issue before this Court is whether the Judicial Officer² erred in finding that he does not have jurisdiction to hear Petitioner's appeal.

The Rules of Practice governing Department of Agriculture proceedings address the time for filing an appeal to a Judicial Officer. The regulations provide:

Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145. The Rules of Practice further provide that the ALJ's decision becomes final and effective thirty-five days after the date it is served. *Id.* § 1.139. The Department of Agriculture has consistently held that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the ALJ's decision becomes final. *See, e.g., In re Ow Duk Kwon, d/b/a Kwang Dong Chinese Herbs Enterprise, Inc., et al.*, 55

² Judicial Officers are delegated their authority by the Secretary. See 7 C.F.R. § 2.35.

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Agric. Dec. 78, 83 (1996)(citing cases). The Department has found this construction of the Rules of Practice consistent with the rule of law that federal courts of appeals are without jurisdiction to review a decision where a notice of appeal is untimely. *See id.* at 84; *see also Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988)(stating rule regarding untimely notice of appeal under the Federal Rules of Appellate Procedure).

An agency's interpretation of the statute it administers is entitled to deference, provided that its interpretation is a permissible construction of the statute. *Dep't of the Navy v. Federal Labor Relations Authority*, 836 F.2d 1409, 1410 (3d Cir. 1988). An agency decision may only be overturned if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* (quoting 5 U.S.C. § 706(2)(A)). The Judicial Officer's findings that Petitioner received service of the ALJ's decision on January 14, 1999 and filed his appeal petition on March 5 are supported by the record.³ In addition, the March 5 filing is untimely under § 1.14 5 of the Rules of Practice. We cannot find that the Judicial Officer's decision that he was without jurisdiction to review the ALJ's decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. Accordingly, we will deny the petition for review.⁴

³ Because this Court's jurisdiction is confined to a review of the Judicial Officer's April 5 order, we do not address the Judicial Officer's ruling on March 1 that Petitioner's February 2 letter was not an appeal petition.

⁴ Petitioner filed a document in this Court which has been construed as a motion for appointment of counsel and filed a motion to proceed *in forma pauperis* in connection therewith. Based upon the financial information provided by Petitioner, the motion to proceed *in forma pauperis* is granted. However, because Petitioner's claim does not have merit, the motion for appointment of counsel is denied. *See Tabron v. Grace*, 6 F.3d 147, 155 (3d Cir. 1993)(before court exercises discretion in favor of appointing counsel, it must first appear that the claim has some merit).